IN THE

Supreme Court of the United States

October Term, 1961.

No. 189

SAMUEL RAPPAPORT and ELI PENN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

SAMUEL RAPPAPORT,
ELI PENN,
Petitioners,
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INDEX

	PAGE
Opinion below	2
Jurisdiction	2
Question presented	2
Statement	2
Reasons for granting the writ	5
Conclusion	10
Appendix	11

CITATIONS

CASES:

Erber v. United States, 2 Cir. 1916, 234 Fed. 221	3
United States v. Kram, 3 Cir. 1957, 247 F. 2d 830	5

IN THE

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October Term, 1961.

No.

SAMUEL RAPPAPORT and ELI PENN,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, Samuel Rappaport and Eli Penn, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on June 5, 1961.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is unreported and is printed in the Appendix hereto, *infra* p. 11.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 5, 1961 (Appendix, *infra* pp. 16-18). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED.

In the prosecution of a scheme to fraudulently obtain merchandise by furnishing false credit references through the mails, was it prejudicial error to allow the Government to show that in a lawful enterprise, unconnected with the scheme charged and prior to its inception, the defendants had not paid for goods which they had purchased?

STATEMENT.

An indictment was returned in the United States District Court for the Eastern District of Pennsylvania charging petitioners with using the mails to defraud and conspiracy.

There was one indictment and each was found guilty of Count 1 charging the conspiracy and twenty other counts charging the substantive offense. Petitioners were sentenced to terms of imprisonment and fined (249a-250a, 253a-254a).

Count 1 of the indictment charged a conspiracy to use the mails to defraud by furnishing false credit references, commencing on or about July 1, 1956 and continuing until February, 1958 (7a-18a). Sufficient evidence was introduced from which the jury could find the existence of this conspiracy commencing in September 1957 and the participation in it of petitioners Samuel Rappaport and Eli Penn. The twenty substantive counts relate to separate mailings in furtherance of this conspiracy and rely upon that conviction for their validity as to each petitioner (224a-225a).

From October, 1957 through December, 1957 Harry Gelman, trading as himself and Silvio Petti, trading as Silvio Distributor, mailed to various manufacturers and distributors orders for the purchase of their merchandise and property. These purchase orders listed as credit references: Roma Manufacturing Co., 906 Spring Garden Street; E. A. Whitman Ind., 904 E. Tioga Street; Pennsylvania Toy Mfg., 745 South 9th Street; Continental Hardware Co., 822 South Street, all in Philadelphia, Pennsylvania; and the C. & R. Novelty Lamp Mfg. Co., 949 Kaighn Avenue; Dragon Electrical Mfg. Co., 921 South 3rd Street; Maxwell Tool Company, 822 North 7th Street, all in Camden, New Jersey. These business references were only "mail drops", nonexistent concerns set up for the sole purpose of answering inquiries as to the credit standing of Harry Gelman and Silvio Distributor. Any vendor who inquired of these references was informed, in effect, that Harry Gelman and Silvio Distributor were trustworthy and quick to pay their bills.

The merchandise shipped to Harry Gelman and Silvio Distributor was never paid for.

Samuel Rappaport was implicated in the crimes charged by testimony that he hired Petti in August, 1957 and Gelman in September, 1957 to act as buying powers for him (Transcript pp. 472-484, 953); that he subsequently supplied them with the names of the companies from which to purchase, the goods and quantities to be ordered and the fictitious references to be used as set forth above; that he financed the entire venture; and that the merchandise received was turned over to him for resale.

Eli Penn was implicated by testimony that commencing in September of 1957 he, acting under various aliases, leased and set up the properties to be used as the "mail drops" (Transcript pp. 143-148, 166, 194-195, 209-211, 226, 272, 282, 981, 992); that he retrieved the mail delivered to them; and that he otherwise assisted in channeling the merchandise to Samuel Rappaport.

The defense of Eli Penn and Samuel Rappaport pictured Petti and Gelman as the only conspirators, Penn as Petti's employee from September to December, 1957 acting innocently under his orders (Transcript pp. 2503-2517), and Rappaport as a mere buyer in due course from Petti and Gelman (Transcript pp. 2622-2653). These explanations were not accepted by the jury.

As part of its case the Government was permitted to develop at great length the business dealings of Eli Penn and Samuel Rappaport prior to September, 1957. From February to September, 1957 Eli Penn, trading as E. Penn Distributor, was in business as a wholesale distributor at 3551 Kensington Avenue, Philadelphia (31a-38a). From March to July, 1957, as E. Penn Distributor, he ordered and received large quantities of varying merchandise from numerous concerns for which he never made payment (73a-150a). During this period Samuel Rappaport was ac-

customed to pick up merchandise in large quantity from Penn and take it to 137 Market Street (56a-71a). All this testimony was elicited over frequent objection and motions for the withdrawal of a juror on the ground that E. Penn Distributor was a lawful enterprise, that no false credit references were used, that it was unconnected with the conspiracy charged, and that its only purpose was to prejudice the defendants by proof that they had not paid their bills (50a-51a, 81a, 103a-109a, 131a). The many physical exhibits which supplemented this oral testimony were also admitted over the same objections and motions (Transcript pp. 1925, 1933, 1934, 1971, 1974-1977, 1981, 1985-1994, 2004, 2020-2180). In charging the jury the trial judge said the case was an important one because credit is the life blood of business and if we cannot believe in people to whom credit is being granted then we might as well know it (226a-227a).

REASONS FOR GRANTING THE WRIT.

Count 1 of the indictment in this case charged a conspiracy to use the mails to defraud by *furnishing false credit references* (7a-18a). The twenty substantive Counts relate to separate mailings in furtherance of this conspiracy and rely upon that conviction for their validity as to each of the petitioners (224a-225a). Having set up "false credit references" in the indictment as the substance of the offense, the Government was restricted to trying petitioners upon that theory of guilt and no other. *United States v. Kram*, 3 Cir. 1957, 247 F. 2d 830.

The indictment charged the conspiracy as commencing on or about July 1, 1956 (7a). Sufficient evidence was introduced from which the jury could find the existence of

this conspiracy commencing in September 1957 and the participation in it of petitioners Samuel Rappaport and Eli Penn.

Despite the starting date of the conspiracy as fixed by the proof and the substance of the offense as fixed by the indictment, the Government was permitted to establish at great length the following facts:

(a) From February to September, 1957 Eli Penn, trading as E. Penn Distributor, was in business as a wholesale distributor at 3551 Kensington Avenue, Philadelphia (31a-38a);

(b) During this period freight haulers regularly delivered large shipments of merchandise to Penn (49a-52a);

(c) On March 27, 1957 Eli Penn, trading as E. Penn Distributor, mailed a purchase order to the Enterprise aluminum Company for merchandise costing $211.92. This merchandise was shipped to Penn but never paid for by him (85a-89a);

(d) On April 10, 1957 Eli Penn, trading as E. Penn Distributor, mailed a purchase order to the Winthrop Watch Corporation for merchandise costing $225. This merchandise was shipped to Penn but never paid for by him (137a-146a);

(e) In April 1957 Eli Penn, trading as E. Penn Distributor, mailed a purchase order to Joell Manufacturing Co. for merchandise costing $129.60. This merchandise was shipped to Penn but never paid for by him (109a-127a);

(f) On April 30, 1957 Eli Penn, trading as E. Penn Distributor, mailed a purchase order to the Continental Scale

Company for merchandise costing $113.40. This merchandise was shipped to Penn but never paid for by him (73a-85a);

(g) On May 16, 1957 Eli Penn, trading as E. Penn Distributor, ordered merchandise from Simonsen Industries costing $138. This merchandise was shipped to Penn but never paid for by him (136a);

(h) In June and July, 1957, Eli Penn, trading as E. Penn Distributor, mailed purchase orders to M. Pressner & Co. for merchandise costing $540. This merchandise was shipped to Penn but never paid for by him (94a-109a);

(i) On July 20, 1957 Eli Penn, trading as E. Penn Distributor, mailed a purchase order to Simonsen Industries for merchandise costing $171.60. This merchandise was shipped to Penn but never paid for by him (128a-135a);

(j) During this period Samuel Rappaport was accustomed to pick up merchandise in large quantity from Penn and take it to 137 Market Street (56a-71a).

All of this testimony was admitted over frequent objection and motions for the withdrawal of a juror on the ground that E. Penn Distributor was a lawful enterprise, that no false credit references were used, that it was unconnected with the conspiracy charged, and that its only purpose was to prejudice the defendants by proof that they had not paid their bills (50a-51a, 81a, 103a-109a, 131a). The many physical exhibits which supplemented this oral testimony were also admitted over the same objections and motions (Transcript pp. 1925, 1933, 1934, 1971, 1974-1977, 1981, 1985-1994, 2004, 2020-2180).

In view of the scheme to defraud by use of false credit

references which the Government had already proven when these facts were elicited, a jury might easily have concluded, although there was no proof of it, that this testimony showed an earlier scheme in which Rappaport and Penn had joined forces to defraud. At the least, however, it permitted the Government to characterize Penn as a dead beat in a case where good credit was the touchstone.

The decision in this case is in substantial conflict with *Erber v. United States*, 2 Cir. 1916, 234 Fed. 221. In that case it was charged and proven that Erber, with others, entered into a conspiracy to use the mails to defraud by furnishing false credit references, that to effect their scheme defendants organized the Manhattan Merchandise Company and in the name of that Company ordered merchandise on credit for which they never intended to pay, giving as references persons and companies who would furnish satisfactory references regarding their prior transactions with the Manhattan Merchandise Company, even though they had no such transactions. During the existence of this conspiracy Erber was conducting a business of his own known as the Photo Play Coupon Company. Two of the firms from which Manhattan Merchandise Company had ordered and not paid for goods were the Pocket Umbrella Company and the Economy Manufacturing Company. After each of the witnesses from these Companies had testified to its transaction with Manhattan Merchandise, the Government was permitted to elicit testimony that Erber trading as Photo Play had also corresponded with these Companies and received goods on credit for which he did not pay. Erber's conviction was reversed.

The Court said:

> "In so far as the testimony showed that Erber knew of the existence of the Pocket Umbrella Company and the Economy Manufacturing Company, as evidenced by the fact that he had corresponded with them, it

was admissible for the reason that such testimony was some evidence to corroborate the testimony of Nadelman as to the writing of letters to the same concerns with which Manhattan Merchandise Company had dealt. But the testimony as to nonpayment to the Pocket Umbrella Company and the shipment by the Economy Manufacturing Company was entirely irrelevant. In the one case the fact that the goods were not paid for was plain, and in the other the purpose and effect were clearly to create a like reference. As the trial court truly said: 'We are not suing on an open account. We are not trying to establish a debt.'

"The result of this testimony was to produce an atmosphere unfavorable to defendant because he had not paid his debts, and its admission was error within the principle referred to in the Baron transaction in Scheinberg v. United States, 213 Fed. 757, 130 C. C. A. 271, Ann. Cas. 1914D, 1258. On the evidence there was a complete failure to show any unlawful scheme devised by Erber in connection with his Photo Play Coupon Company, . . ."

The serious injury to the petitioners Penn and Rappaport by the admission of this testimony was only magnified by the closing statement of the trial judge in his charge to the jury, when he told them:

"It is a very important case, important to each and every one of these defendants. It is important to the community at large. *It is important that the wellsprings of commercial transactions be kept pure; that commercial transactions be undefiled*, and that fraudulent schemes should not be imposed on innocent people. It is important because it is up to you twelve men and women to pass judgment on a serious matter which affects the public interest. If we cannot rely

on references, *if we cannot believe in people to whom credit is being granted—because credit is the life blood of business—then we might as well know it;* so, as I say, you are charged with a very serious case, a very serious responsibility" (Italics ours) (226a-227a).

CONCLUSION.

For the foregoing Reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SAMUEL RAPPAPORT,
ELI PENN,
Petitioners.

APPENDIX.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 13,388, 13,475, 13,476

UNITED STATES OF AMERICA,

v.

SAMUEL RAPPAPORT,

Appellant in No. 13,388.

LENNORE (also known as LYNN) RAPPAPORT,

Appellant in No. 13,475.

ELI PENN,

Appellant in No. 13,476.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 4, 1961

Before: GOODRICH, MCLAUGHLIN and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed June 5, 1961.)

By HASTIE, *Circuit Judge*.

This mail fraud case was tried under an indictment containing a conspiracy count as well as several substantive counts alleging fraud through the mailing of fictitious credit references in a scheme to obtain merchandise without ever paying for it. Samuel Rappaport, his wife Lennore Rappaport, and Eli Penn have taken these appeals from their convictions on the conspiracy count and certain substantive counts. The sentences on the several counts were made to run concurrently and the grounds of appeal are such that it will suffice to examine the issues in the context of the conspiracy count.

It is charged in the indictment that the conspiracy began about July 1, 1956 and continued until February 1958. The scheme is alleged to have involved leasing vacant premises and using these addresses, coupled with fictitious business names, to identify non-existent credit references. In the meantime, retail establishments were opened under the nominal proprietorship of Silvio Petti and Harry Gelman, conspirators who are not parties to this appeal. The fictitious references were then sent to suppliers of goods and merchandise in an effort to get credit for the newly opened establishments. When prospective suppliers made inquiry by mail to the fictitious references, the conspirators themselves answered the letters by mail, giving false assurances in the names of the fictitious references that the prospective purchasers enjoyed good credit standing. This fraud resulted in the sale and delivery of large amounts of merchandise, none of which was paid for. The evidence estab-

lished overwhelmingly and without contradiction that this fraudulent scheme was devised and carried out with the use of the mails as an integral and essential feature.

Penn's defense was that he was an innocent employee of Petti, one of the named conspirators who was the nominal proprietor of one of the establishments which obtained merchandise by fraud. Rappaport's defense was that he was merely an innocent purchaser of some of the merchandise from those who were subsequently shown to have obtained it by fraud of which he was unaware. These contentions were contradicted by impressive evidence that Rappaport and Penn were principal participants, indeed the moving spirits, in the entire scheme.

It was shown that Rappaport was a merchant, experienced in retail selling. In 1956 he had hired Petti as a truck driver. In 1957, according to Petti's own testimony, Rappaport set Petti up in business under the name "Silvio Distributors". Rappaport paid Petti's original business costs, including store rental. Though ostensibly Petti became an independent business man, Rappaport continued to pay him a salary and promised him a bonus at the end of the year. Admittedly, much of the merchandise purchased in the name of Silvio Distributors was ultimately transferred to Rappaport's own place of business and there sold at auction. Penn was the brother-in-law of Rappaport and a business associate. He personally participated in the acquisition of several vacant premises which were used thereafter as addresses for fictitious credit references. He was seen collecting mail at one of these vacant premises. He instructed Petti on details of operating the Silvio Distributors establishment.

There was evidence of similar conduct by Rappaport and Penn in setting up a second business in the name of Gelman, another conspirator. The same pattern of financing and use of fictitious credit references appeared in connection with Gelman's acquisition of merchandise. Indeed,

Petti and Gelman were principal prosecution witnesses and each told a detailed story of a scheme devised and directed by Rappaport and Penn. As has already been indicated, Rappaport and Penn claimed that they acted innocently and that the others were the wrongdoers.

In these circumstances, the fact that Petti was a truck driver without business experience, capital, or any apparent means of financing a new business would have made it most difficult for any jury to credit the testimony of Rappaport and Penn that they were innocently dealing with Petti and were unaware of any fraudulent scheme to obtain credit. Their story was implausible on its face.

In this context we consider the only substantial point made by Penn and Rappaport on this appeal. They complain that a large amount of evidence was introduced over objection showing that in the months immediately preceding the establishment of Silvio Distributors and the Gelman enterprise, Penn himself bought a large amount of merchandise as stock in trade for his own business and thereafter failed to pay for it. It is argued that this evidence had no substantial probative value in establishing the conspiracy charged, yet was prejudicial in showing that the discreditable practice of buying merchandise and failing to pay for it was Penn's characteristic way of doing business. If the other evidence of the prosecution which related directly to the fraud charge had been scanty or weak or if Penn's rebuttal of that direct testimony had been strong, this argument of prejudice would have been substantial. *Cf. Erber v. United States*, 2d Cir. 1916, 234 F. 2d 221. But the direct evidence of the wrongdoing charged was so strong and the defense on its face so implausible as to show Penn in a much worse light than did the evidence of past irresponsible business behavior to which he objected. In these circumstances we find no substantial likelihood that Penn was injured by the testimony of past business behavior. A fortiori, Rappaport, who was

not shown to have defaulted on any bills could not have been injured.

The case is different with respect to Rappaport's wife, Lennore. There is no evidence whatever that she was aware of, much less a party to the "Silvio" and "Gelman" enterprises, or the planning or execution of the false credit reference scheme. On the record her business association was solely with "Lynco", a general merchandising enterprise of her husband. In July 1956 she signed a lease for the building where that business was conducted. For a number of months thereafter she worked in the Lynco store, marking merchandise, operating the cash register, and performing other office operations incidental to this business. All of this activity antedated the establishment of the Silvio and Gelman enterprises. None of it was shown to have been in any way connected with or in anticipation of those future enterprises.

A person can be convicted of guilty participation in a conspiracy on the basis of acts innocent in themselves only if he had guilty knowledge that what he did was in furtherance of the corrupt enterprise charged. *United States v. Crimmins*, 2d Cir. 1941, 123 F. 2d 271; *Davidson v. United States*, 8th Cir. 1932, 61 F. 2d 250. Here it is not even shown that Lennore Rappaport's acts in fact aided the conspiracy, much less that she was aware that her conduct was connected with wrongdoing. Her conviction must have been based on speculation without logical basis in the record and, therefore, cannot stand.

The convictions of Samuel Rappaport and Eli Penn will be affirmed. The conviction of Lennore Rappaport will be reversed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,388

UNITED STATES OF AMERICA,

vs.

SAMUEL RAPPAPORT, LENNORE (also known as LYNN) RAPPAPORT, and ELI PENN

SAMUEL RAPPAPORT,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GOODRICH, MCLAUGHLIN and HASTIE,
Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF,
Clerk.

June 5, 1961.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,476

UNITED STATES OF AMERICA,
vs.
SAMUEL RAPPAPORT, LENNORE (also known as LYNN) RAPPAPORT, and ELI PENN

ELI PENN,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GOODRICH, MCLAUGHLIN and HASTIE,
Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF,
Clerk.

June 5, 1961.

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1961

SAMUEL RAPAPORT AND EDI PENN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	3
Conclusion	7

CITATIONS

Case:

Kottcakos v. *United States*, 328 U.S. 750 ... 7

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 189

SAMUEL RAPPAPORT AND ELI PENN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11-15) is not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on June 5, 1961 (Pet. App. 16-18). The petition for a writ of certiorari was filed on June 29, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a trial for mail fraud and conspiracy to use the mails to defraud, the trial court erred in admitting evidence that one of the petitioners had failed to pay his bills.

STATEMENT

Petitioners were tried before a jury in the United States District Court for the Eastern District of Pennsylvania and were convicted of mail fraud and conspiracy to use the mails to defraud (I-R. 238-244).[1] Petitioner Samuel Rappaport was sentenced to concurrent terms of imprisonment of one year on all twenty-eight counts of the indictment and fined a total of $19,000 (I-R. 249-250). Petitioner Eli Penn was sentenced to concurrent terms of three months on each count and to a total fine of $5,500 (I-R. 253-254). The court of appeals affirmed the conviction of petitioners.[2]

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[1] "I-R." refers to appellants' appendix in the court of appeals. "II-R." refers to appellee's appendix in that court.

[2] The court of appeals reversed the conviction of petitioner Rappaport's wife. Other defendants named in the indictment were: Silvio Petti and Harry Gelman, who pleaded guilty and testified for the government; William Rappaport, as to whom a severance was granted because of his physical condition; Geraldine Penn, whose motion for judgment of acquittal was granted; Sidney Fitch and William Prichitko, as to whom the jury failed to agree; Sandra Petti and Jacqueline Gelman, who were not tried (I-R 7, 2-3).

Count 1 of the indictment charged, in substance, that, from approximately July 1, 1956, to February 19, 1958, petitioners and others had conspired to obtain merchandise from some twenty-eight firms, for which they had not intended to pay (I-R. 7-17). The remaining counts of the indictment alleged substantive offenses of mail fraud. The evidence may be summarized as follows:

On June 16, 1956, petitioner Rappaport and his wife took a lease in the wife's name of business premises at 137 Market Street in Philadelphia (I-R. 19-21, 160), and operated a retail store there under the name of Lynco, registered in the wife's name (I-R. 30, 164).

Early in 1957, petitioner Penn, who was Rappaport's brother-in-law, went into the same type of business. He made two small purchases on credit from two manufacturers who had done business with Rappaport and who extended credit to Penn at Rappaport's request. After the bills were paid, Penn used the two manufacturers as credit references (II-R. 9-12, 14-16). After Penn opened his own establishment, he received numerous shipments of merchandise which were never paid for (see I-R. 73-145).

During the summer and fall of 1957, Penn received quantities of merchandise which were sometimes so large that they had to be stored on the sidewalk. Either Penn or Rappaport would then remove the names of the manufacturers from the cartons and deliver the merchandise after business hours to Lynco (I-R. 50-59, 62-67; II-R. 89, 93).

In August, Rappaport approached Petti, who had been with the company as a truck driver, and offered to set him up in business in Camden, New Jersey (II-R. 128-130). Petti accepted the offer and Rappaport set up the business at his own expense (II-R. 130-133). At the new business establishment, Penn would come to give instructions to Petti; at the direction of Rappaport, however, Penn kept out of sight of customers (II-R. 135). Using assumed names, Penn rented several other business premises and identified them with different fictitious names for the sole purpose of receiving mail (II-R. 138-145, 19-20, 22-26, 27-28, 30, 32, 34, 36-37, 40-41, 46-47, 49). None of these names was registered under the fictitious names statute (II-R. 2-7).[3]

Rappaport made a similar arrangement with co-defendant Gelman, setting him up in business in Philadelphia in September 1957 (II-R. 74-79). He was instructed to make up purchase orders, giving as credit references the fictitious places of business previously opened up by Penn (II-R. 80-84). The merchandise Gelman received on the orders went to Lynco (II-R. 91).

Both Petti and Gelman prepared a large number of purchase orders. The firms receiving the orders would direct inquiries to the fictitious credit references. The conspirators would pick up these inquiries and mail favorable replies, following which the goods

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[3] Penn was also active at Lynco during this later period, taking charge at times when Rappaport was absent (II-R. 193-195).

would be delivered to Petti or Gelman, who would then transfer them to Lynco. Rappaport told both Gelman and Petti that payment for the merchandise would be made at the end of the year (II-R. 112, 150), but none of the co-conspirators ever paid for the merchandise. (II-R. 50-73, 95, 101, 102-103, 121-127, 156-168, 171-173, 188-192, 205-212.)

ARGUMENT

The sole contention raised by petitioners is that it was error to permit the introduction of evidence that Penn failed to pay the bills incurred at his own place of business. The court of appeals, evidently believing that this evidence did not relate to the conspiracy charged, disposed of the contention on the ground that the evidence of past business conduct was harmless in view of the strong direct evidence of wrongdoing and the implausibility of the defense offered (Pet. App. 14).

We believe that the evidence was properly admitted in the first place. The indictment, which dated the conspiracy from July 1956, charged (I-R. 12) not only that:

> [i]t was the plan and purpose of the conspiracy to furnish false, fraudulent and fictitious references to the victims hereinabove named, for the purpose of inducing the victims to part with their property and merchandise, in the expectation that an agreed price would be paid for the same, which expectation was induced by the Defendants.

but also that:

> [i]t was * * * an essential plan and purpose of the conspiracy to distribute the property and merchandise which was received from the victims, and to sell, conceal and dispose of said property and merchandise, and to convert the proceeds received therefor, for the use and benefit of the Defendants, without paying or without causing to be paid to the said victims, the agreed price for the said property and merchandise so converted.

In other words, although the conspiracy was directed to the obtaining of merchandise by false credit references, a part of that conspiracy was for the conspirators to derive benefit from the merchandise by not paying for it. In carrying out the earlier portion of the scheme, as the district court pointed out (I-R. 108), Penn found it unnecessary to give fictitious credit references in order to obtain the merchandise. Rather, the scheme in its earlier stage was for Penn to obtain credit, pay his bills for small purchases and then use the creditors as references for subsequent transactions with respect to which Penn's intention was not to pay. This intention was fairly inferable from the fact that, after Rappaport assisted Penn in starting the business, both would transfer the merchandise to Lynco in a clandestine manner, after the labels from the merchandise had been removed. The intention was also inferable from evidence that Penn in fact did not pay his bills for subsequent transactions (see the Statement, p. 3). Since then this portion of the conspiracy was not

essentially different from the subsequent portion with respect to which completely false references were used, evidence which showed that Penn had failed to pay his bills for his later transactions was directly relevant, and its admission was not erroneous.

In any event, as the court of appeals held, there was no prejudice to petitioners by admission of this testimony. The fraudulent conduct of petitioners in negotiating leases for wholly imaginary companies for the purpose of furnishing fictitious references for the businesses set up ostensibly by Petti and Gelman was proved directly. Thus, even if the admissibility of the evidence of Penn's earlier conduct had been questionable, which we deny, the exclusion of this evidence would not have affected the verdict of the jury. Cf. *Kotteakos* v. *United States*, 328 U.S. 750, 764.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JULY 1961.

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